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(1) Supreme Court, U.S.
FILED

07 - 178 MAY 29 2007

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No. 06-_____

In The
Supreme Court Of The United States

CHESTER P. SOLING, individually and on behalf of all similarly situated persons, *Petitioner,*

v.

JOHN MCCAIN, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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QUESTION PRESENTED

Does Mr. Soling have standing to prevent discriminatory impairment of the effectiveness of his decision to donate money to Arizona candidates for federal office, or not, by obtaining a court order prohibiting such candidates from soliciting or accepting donations from out-of-state or out-of-district residents?

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Chester P. Soling, individually and on behalf of all similarly situated persons; *Plaintiff-Appellant*;

John McCain; Stuart Starky; Ernest Hancock; Jim Kolbe; Jeffrey Chimene; Tim Sultan; Eva Bacal; Randy Graf; Robert Anderson, individual candidates for federal political office; *Defendants-Appellants.*

CORPORATE DISCLOSURE STATEMENT

No petitioners are corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mr. Soling respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. Because his protectable interest to make political donations up to $2,000 per candidate is diluted when candidates for federal political office in Arizona solicit and accept donations from out-of-state or out-of-district donors, Mr. Soling and others similarly situated have been harmed. Mr. Soling is unable to obtain injunctive relief barring such practices because he was improperly denied standing by the trial court and the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The opinions of the court of appeals (Case No. 05-16480) (9th Cir. Feb. 26, 2007) (App. A) and district court (Case No. 04-CV-311) (D. Ariz. June 11, 2005) (App. B) have not been reported.

JURISDICTION

This Court has jurisdiction to grant a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals filed on February 26, 2007, pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

2 U.S.C. § 441a(a)(1)(A).

STATEMENT OF THE CASE

Chester P. Soling sued various Arizona candidates for federal office, including his sitting Senator and Congressional Representative, to protect the ***effectiveness*** of his decision as to whether he would donate up to $2,000 to such candidates. Mr. Soling's right to protect the effectiveness of this decision is analogous to his right to protect the effectiveness of his vote. *See McConnell v. FEC,* 540 U.S. 93, 227 (2003). This right was established when the Bipartisan

Campaign Reform Act of 2002 ("BCRA") limited the extent by which donations made by others might dilute the effect of donations made by Mr. Soling, just as the one-man-one-vote rule limits the extent by which votes cast by others might dilute Mr. Soling's vote.

Mr. Soling has standing to protect the effectiveness of his decisions whether to make political donations just as he would have standing to remedy improper impairment of his right to have a fair weight given to his voting decision.

This is entirely different than standing to challenge the BCRA limits on contributions. *See id.* at 224-26. This Petition raises decidedly different points than were addressed in *McConnell* because Mr. Soling does not complain about the limits placed on his donations. Rather, he complains that placing limits on his donations give rise to personal injury when others circumvent BCRA by making donations across state and district lines. By limiting the extent to which Mr. Soling can influence Arizona candidates through making monetary donations, BCRA establishes that Mr. Soling has standing to prevent others from further impairing his right to influence Arizona candidates by violating the principles of BCRA.

In other words, BCRA placed donating money to candidates on the same footing as voting for candidates.

It is just as if before BCRA Mr. Soling could cast many votes and after BCRA he was limited to a single vote. So long as Mr. Soling has equal access to cast his one vote, he does not have standing to complain that he is limited to one vote. *McConnell*, however, says that he would have standing to complain if out-of-state or out-of-district residents were casting votes in his Arizona district, because those votes would improperly dilute the effectiveness of Mr. Soling's vote.

By limiting Mr. Soling's individual donations, BCRA creates a protectable interest in preserving the effectiveness of his donations analogous to his interest to protect the effectiveness of his vote. Specific injury to Mr. Soling arises, whether he chooses to make a donation to a candidate or not, because choosing to donate or not is akin to voting for one candidate or another. The effect of Mr. Soling's choice is blunted, whether his choice is to donate or not, if the candidate can accept donations from non-constituents. The injury, therefore, is directly caused when the candidate accepts out-of-state or out-of-district donations. This injury will be redressed if, as Mr. Soling seeks, candidates are enjoined from accepting such donations.

In short, the Petition presents the Court with the opportunity to establish that Congress, by enacting BCRA, implicitly gave individuals standing to ensure

that political candidates do not circumvent the purpose of BCRA by seeking and accepting donations from outside their state or district.

REASON FOR GRANTING THE PETITION

Mr. Soling, as an individual, has standing to seek remedy of an injury caused when political candidates accept donations from non-constituents in violation of rights established by BCRA. The importance of this question is demonstrated by the fact that its outcome could affect every federal election subject to BCRA. Yet, when in *McConnell* this Court made an extensive and careful discussion of a variety of standing issues arising from BCRA, it did not have the opportunity to address the issue raised here: whether BCRA provides Mr. Soling with standing to protect his interest in maintaining the effectiveness of political donations allowed by BCRA.

The Court of Appeals gave short shrift to its standing analysis. Without offering any supportive analysis, it held that of the three requirements that constitute the "irreducible constitutional minimum of standing, ... an injury in fact, a causal connection between the injury and the conduct complained of, [and a] substantial likelihood that the requested relief will remedy the alleged injury in fact," *McConnell*, 540 U.S. at 225-26, the first requirement, injury in fact, was

lacking. *See* Memo. Dec. at 2 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). *Lujan,* however, is inapposite and did not resolve the issues raised here.

Unlike the situation in *Lujan*, Mr. Soling is not "assert[ing] an injury [that] arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else" and, therefore, there is no basis to find that his standing ought not to be "substantially more difficult to establish." *See Lujan,* 504 U.S. at 562. Rather, Mr. Soling has an ordinary burden to show standing because he is asserting an injury to a right already established by Congress, an injury that is caused by actions of private citizens.

Although Mr. Soling is complaining about donations made by others, he is not like the Adams plaintiffs-candidates who were denied standing in *McConnell* because their alleged injury was partly due to their decision to not exercise some of the rights allowed under BCRA. *See McConnell*, 540 U.S. at 229. Mr. Soling's injury, in contrast, exists whether or not he takes full advantage of the donation limits allowed by BCRA. His injury arises completely from the actions of Arizona political candidates when they solicit and accept donations from out-of-state or out-of-district

donors—something over which Mr. Soling has no control.

Mr. Soling has the same basis for standing as do plaintiffs who complain of vote dilution injury:

> A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by ... a stuffing of the ballot box.

Baker v. Carr, 369 U.S. 186, 208 (1962).

BCRA establishes a right and a limit of a political activity akin to the right and limit to vote. BCRA gives Mr. Soling a right to make campaign donations and limits the extent to which he can make such donations. Other federal law establishes and limits his right to vote. By having this dual effect, BCRA provides Mr. Soling with a protectable interest to make allowable donations and a protectable interest to keep others from diluting the effect of his donations. As in the case of voting, it does not matter that Mr. Soling is injured no more than any other voter. *See id.* at 206 (noting that the Court has "squarely held that voters who allege facts showing disadvantage to themselves as individuals have standing to sue").

Just as the Court recognized in *Baker*, its inquiry into standing does not and should not reach the merits of the claim:

> It would not be necessary to decide whether appellants' allegations of impairment of their votes ... will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of 'the right possessed by every citizen' to require that the government be administered according to law.

Id. at 208. Hence, this Court should not inquire into whether BCRA ultimately entitles Mr. Soling to relief. Rather, the Court should determine that Mr. Soling has standing to obtain an answer to that question in the courts.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternati e, the decision of the court of appeals should be vacated with instruction to apply the principles set out in *Baker v. Carr* to determine standing.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT SUBMITTED FEBRUARY 20, 2007 AND FILED FEBRUARY 26, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-16480

D.C. No. CV-04-00311-FRZ

MEMORANDUM*

CHESTER P. SOLING, individually and on behalf of all similarly situated persons,

Plaintiff - Appellant,

v.

JOHN McCAIN; et al.,

Defendants - Appellees.

Appeal from the United States District Court for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted February 20, 2007**

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Before: BEEZER, FERNANDEZ, and McKEOWN, Circuit Judges.

Chester P. Soling appeals from the district court's order dismissing his action for lack of standing and failure to state a claim. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Whitmore v. Federal Election Comm'n*, 68 F.3d 1212, 1214 (9th Cir. 1996), and we affirm.

In his amended complaint, Soling alleged that Arizona's congressional candidates have a legal duty to represent only the interests of their constituents and that by receiving campaign contributions from residents of other states or election districts, the candidates violate the constitutional rights of Soling and other Arizona voters.

The district court properly dismissed Soling's action for lack of standing because Soling's allegations of harm are merely hypothetical. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Because we affirm the dismissal on standing grounds, we do not reach the other issues raised on appeal. *See Snake River Farmers' Ass'n. Inc. v. Dep't. of Labor*, 9 F.3d 792, 795 (9th Cir. 1993).

Appellees' request for fees and costs is denied without prejudice to filing a proper motion pursuant to Fed. R. App. P. 38.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JUNE 11, 2005 AND FILED JUNE 20, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 04-CV-311-TUC-FRZ

Chester P. Soling, individually and on behalf of all similarly situated persons,

Plaintiff,

vs.

John McCain; Stuart Starky; Ernest Hancock; Jim Kolbe; Jeffrey Chimene; Tim Sultan; Eva Bacal; Randy Graf; Robert Anderson; John Does I-X; Jane Does I-X,

Defendants.

ORDER

Pending before the Court is Defendants John McCain and Jim Kolbe's motion to dismiss Plaintiff Chester P. Soling's Amended Complaint. Defendant Eva Bacal joined in the motion to dismiss. On November 10, 2004, United States Magistrate Judge Charles R. Pyle issued a Report and Recommendation, recommending that the Court grant the motion to dismiss. Soling filed timely objections to the Report and Recommendation. McCain and Kolbe filed a response to the objections, and Soling filed a reply. As

explained in more detail below, the Court will adopt Magistrate Judge Pyle's Report and Recommendation, grant the motion to dismiss, and dismiss Soling's Amended Complaint.

Background

The gravamen of Soling's Amended Complaint is his allegation that "United States Senators and Congressmen owe a legal duty to their constituents to not be beholden to anyone other than their constituents," and that congressional candidates violate that duty and "Article I, Article V, Amendment I, Amendment V, and/or Amendment XVII, of the United States Constitution" when they accept or use money from non-constituents — individuals who are outside the candidate's State or congressional district — and when they use personal funds above the $2,000 contribution limit that applies to others.

In their motion to dismiss, McCain and Kolbe contend that Soling has failed to state a claim upon which relief can be granted because limiting a candidate's use of personal funds violates the Constitution and because the theory that a congressperson cannot be beholden to people outside his or her political district is "frivolous." They also argue that Soling's constitutional claims fail because he has not alleged a deprivation of rights under color of governmental authority. Finally, McCain and Kolbe argue that Soling lacks standing to bring his claims because he has not suffered a concrete injury, because he has not shown a causal link between his alleged injury and non-constituents contributions, and because the requested relief would not redress his alleged injury.

Appendix B

In his Report and Recommendation, Magistrate Judge Pyle concluded that Soling's claims based on a candidate's use of personal funds failed to state a claim because the Supreme Court has held that personal spending limits violate the First Amendment. He concluded that Soling's claims based on a candidate accepting or using funds from non-constituents failed to state a claim because there was no legal basis to establish a duty for congressmen to exclusively represent their constituents or to prohibit non-constituent contributions. Specifically, Magistrate Judge Pyle found that Soling could not establish a claim under the due process clauses of the Fifth and Fourteenth Amendments because Defendants were private individuals acting on their own behalf, without governmental action, and that neither Article V of the United States Constitution nor the Seventeenth Amendment established a duty to represent constituents exclusively.

In his Report and Recommendation, Magistrate Judge Pyle also found that Soling lacked standing because his injury was abstract and speculative, not concrete. He also rejected the claim that Soling had standing because McCain and Kolbe had not met with him. Finally, Magistrate Judge Pyle recommended that, given the other bases for dismissing the case, the Court should not dismiss the case on frivolousness grounds.

In his objections to the Report and Recommendation, Soling contends that Magistrate Judge Pyle erred in finding that congressmen have no duty to represent only the interests of their constituents. Soling contends that Magistrate Judge Pyle relied on Ninth Circuit dictum that does not address the

"central components" of his allegations. Soling argues that congressmen have a "duty to represent the interests of their constituents when they are at odds with non-constituent contributors, and that accepting contributions from non-constituents violates this duty."

Soling also claims that Magistrate Judge Pyle erred in concluding that there is no state action when sitting congressmen conduct campaign activities, in failing to determine whether congressional hopefuls' campaign activities were state action, and in concluding that Defendants' actions did not deprive Soling of equal suffrage in the Senate. Soling contends that Magistrate Judge Pyle mischaracterized Defendants' duty, arguing that his true position is that congressmen "owe a duty to their constituents that outweighs the duty they owe to non-constituents when the two groups' interests conflict." And Soling contends that Magistrate Judge Pyle erred in concluding that Soling had failed to state a claim concerning the use of personal funds, arguing that the problem that arises when a candidate accepts non-constituent contributions also arises when a candidate uses personal funds. Finally, Soling contends that Magistrate Judge Pyle erred in concluding that he lacks standing and in dismissing the proposed class without determining whether other potential class members suffered harm.

Standard of Review

Because Soling filed timely objections to the Report and Recommendation, the Court reviews de novo the Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Appendix B

Discussion

Magistrate Judge Pyle issued his Report and Recommendation after reviewing the parties' briefs and hearing argument on the motion. In the Report and Recommendation, he provided a detailed analysis of the facts, legal standards, and legal authority supporting his recommendations.

The Court has independently and carefully reviewed the record, the hearing transcript, the relevant case law, the Report and Recommendation, Soling's objections, McCain and Kolbe's response, and Soling's reply.

The Court agrees with Magistrate Judge Pyle's conclusion that Soling has failed to state a claim upon which relief can be granted. The Court notes that congresspersons have diverse constituencies whose interests are not identical nor easily ascertainable. A congressperson surely tries to please the majority of his or her constituents because, regardless of who contributes to the congressperson's campaign, the constituents ultimately decide whether to retain a sitting congressperson or elect a new candidate whom they believe is more attuned to their interests.

The Constitution protects, rather than prohibits, a candidate's personal expenditures to further the candidate's campaign. *See Buckley v. Valeo*, 424 U.S. 1, 51-54, 96 S. Ct. 612, 650-51, 46 L. Ed. 2d 659 (1976) (statutory limit on candidate's personal expenditures "clearly and directly interferes with constitutionally protected freedoms;" "the First Amendment simply cannot tolerate [the statute's]

restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy"). And, although Soling contends that the Ninth Circuit Court of Appeals' statement in *Whitmore v. Federal Election Commission*, 68 F.3d 1212, 1216 (9th Cir. 1996), that "[n]either the Constitution nor the United States Code affords plaintiffs any support for their political theory [that the Constitution entitles them to representation by someone not beholden to non-constituents]," is mere dicta, the Court finds it persuasive and Magistrate Judge Pyle did not err in relying on it to conclude that Soling had failed to state a claim regarding non-constituent contributions.

The Court also agrees with Magistrate Judge Pyle that there is no state action here and that the Constitutional provisions and amendments upon which Soling relies do not establish a duty that congressmen or congressional candidates act exclusively for the benefit of their constituents and do not establish a duty to their constituents that outweighs the duty owed to non-constituents.

The Court similarly agrees with Magistrate Judge Pyle's alternative holding that Soling lacks standing because he has alleged an abstract, rather than a concrete, injury. *See Froelich v. Federal Election Commission*, 855 F. Supp. 868, 870 (E.D. Va. 1994). And Soling's allegation that he was personally injured because McCain and Kolbe did not meet with him does not create standing here; Soling has not met his burden of showing that this injury is fairly traceable to McCain and Kolbe's acceptance of non-constituent contributions or that the relief he requests would likely remedy the injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992).

Finally, although Magistrate Judge Pyle did not specifically address the issue of class certification, dismissal of the proposed class is appropriate. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022-23 (9th Cir. 2003) (remanding with instructions to dismiss and noting that "our law makes clear that 'if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.'" (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674 (1974))).

Conclusion

In light of the foregoing,

IT IS ORDERED that United States Magistrate Judge Charles R. Pyle's November 10, 2004 Report and Recommendation (U.S.D.C. document #41) is **ADOPTED**.

IT IS FURTHER ORDERED that Defendants McCain and Kolbe's Motion to Dismiss (U.S.D.C. document #29) and Defendant Bacal's joinder (U.S.D.C. document #32) are **GRANTED**.

IT IS FURTHER ORDERED that this case is **DISMISSED** against all parties. The Clerk of the Court is directed to enter judgment accordingly.

DATED this 11th day of June, 2005.

s/ Frank R. Zapata
Frank R. Zapata
United States District Judge

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JOHN McCAIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX C — REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE CHARLES R. PYLE, FILED NOVEMBER 10, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CV 04-00311-TUC-FRZ (CRP)

CHESTER P. SOLING,

Plaintiff,

v.

JOHN McCAIN, et al.,

Defendants.

REPORT AND RECOMMENDATION

Pending before the Court is Defendants McCain's and Kolbe's Combined Motion to Dismiss the Complaint and Memorandum in Opposition to Plaintiffs Motion for Preliminary Injunction (Docket # 29), which has been joined by Defendant Bacal (Docket # 32).

Plaintiffs lawsuit has been assigned to District Judge Frank R. Zapata. Pursuant to the Rules of Practice of this Court, this matter was referred to Magistrate Judge Charles R. Pyle for a Report and Recommendation.

On October 29, 2004, Magistrate Judge Charles R. Pyle held oral argument on Plaintiff's Motion for Preliminary Injunction and Defendants' Motion to Dismiss. At the time

of the hearing, Plaintiff withdrew his request for a preliminary injunction (Docket # 18) because the general election was only a few days away. The Magistrate Judge recommends that the District Court, after its independent review of the record, enter an order granting Defendants' Motion to Dismiss.

I. BACKGROUND

A. STATEMENT OF THE CASE

Plaintiff Chester Soling is an individual who is registered to vote in Arizona Congressional District No. 8. Defendants are, or were, candidates in the 2004 general election for the office of U.S. Senator from Arizona and U.S. Congressman from Arizona Congressional District 8.

Plaintiff's Amended Complaint principally challenges the lawfulness of the defendant candidates accepting campaign contributions from out-of-state contributors, or, in the case of the candidates for Congressional Representative, from contributors residing outside Congressional District No. 8. Additionally, Soling complains that the individual candidates should not be permitted to contribute to their own campaign in excess of the federal contribution limitations. Plaintiff relies on Article I, Article V, and the Fifth, Fourteenth and Seventeenth Amendments of the Constitution. Plaintiff asserts in his Motion for Preliminary Injunction that he attempted unsuccessfully to meet with Senator McCain and Representative Kolbe. Soling argues he was unable to obtain an appointment with these elected officials because of the overwhelming influence of out-of-state contributors.

Appendix C

Defendants McCain and Kolbe have filed a Motion to Dismiss, in which Defendant Bacal joins. Defendants argue Soling's Amended Complaint fails to state a claim for relief, defendants are private individuals not participating in "state action," that Plaintiff does not have standing, and federal jurisdiction cannot be based on such a frivolous complaint.

B. MOTION TO DISMISS STANDARD

A claim may only be dismissed under FED.R.CIV.P., Rule 12(b)(6), failure to state a claim only if "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957) (citation omitted); *Cahill v. Liberty Mutual Insurance Co.*, 80 F.3d 336, 338 (9th Cir. 1996)(citation omitted). When considering a motion to dismiss, all material allegations of the complaint, as well as all reasonable inferences, are accepted as true. *Cahill*, 80 F.3d at 338. A plaintiff fails to prove a set of facts that entitle him to relief when he fails to present a cognizable legal theory or allege facts sufficient to support a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1998). However, mere conclusory allegations are insufficient to defeat a motion to dismiss. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). And "the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 852, 854 (9th Cir. 1994) (citation omitted).

Appendix C

A motion to dismiss for lack of subject matter jurisdiction under FED.R.CIV.P., Rule 12(b)(1) may either attack the allegations of the complaint as insufficient to confer subject matter jurisdiction or attack the existence of subject matter jurisdiction in fact. *Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the motion to dismiss attacks the allegations of the complaint as insufficient to confer subject matter jurisdiction, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Federation of African Amer. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.1996). However, when the motion to dismiss is a factual attack on subject matter jurisdiction, plaintiff's allegations are not presumed as true and plaintiff has the burden of proving that jurisdiction does exist in fact. *Thornhill*, 594 F.2d at 733.

II. DISCUSSION

A. LIMITATION ON CANDIDATE'S PERSONAL CONTRIBUTIONS TO HIS OR HER OWN CAMPAIGN

Plaintiff argues, half-heartedly, that defendants are prohibited by the Constitution from exceeding the federal statutory campaign contribution limitations for individual donors. Plaintiff argues that without enforcing this limitation, he is at risk as a voter of having the candidate act in his own self-interest over the interest of his constituency.

Limitations on candidate spending of personal or family resources on his or her campaign have specifically been held

by the U.S. Supreme Court to be unconstitutional in violation of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 51-54, 96 S.C. 612, 650-651 (1976). Campaign finance laws do not increase or decrease the potential for an elected official to act in his own self-interest. The more a candidate relies on his own money, the less he is influenced by outside contributors. *Buckley v. Valeo*, 424 U.S. at 53, 96 S.C. at 651.

Plaintiff's allegation that defendants contribute to their own campaigns in excess of the federal campaign finance limitations does not state a claim for relief. That portion of the First Amended Complaint should be ordered dismissed.

B. FAILURE TO STATE A CLAIM

Plaintiff claims he is entitled to a "republican form of government" and that out-of-state or district contributions defeat that entitlement. The first sentence of the Amended Complaint summarizes Soling's legal premise as follows: "United States Senators and Congressmen have a legal duty to their constituents to not be beholden to anyone other than their constituents."

The Ninth Circuit has already established that there is no legal basis for this supposed duty. *Whitmore v. Federal Election Commission*, 68 F.3d 1212, 1216 (9th Cir. 1995); *see also Vannatta v. Keisling*, 151 F.3d 1215, 1217 (9th Cir. 1998) (implied overruling on other grounds, *Montana Right to Life Assen v. Eddlernan*, 343 F.3d 1085 (9th Cir. 2003)). The law of this Circuit has clearly established that claims based on entitlement to a "republican form of government"

or the prohibition of out of district campaign contributions do not state a claim for relief. *Id.*

The authorities suggested rather casually by Plaintiff are unavailing. Claims under the Fifth or Fourteenth Amendment due process clause require state action. No state law or action of state government is at issue in this case. Defendants are private individuals acting on their own behalf in running for office.

Article V of the U.S. Constitution provides the method to adopt amendments to the Constitution, and provides in pertinent part:

> no State, without its consent, shall be deprived of its equal suffrage in the Senate.

The only purpose of this provision is to prevent the possibility of two-thirds of the States adopting an amendment to reduce the number of Senators in a small state from two to one or none. That would be antithetical to one of the fundamental compromises in the Constitution which established a bicameral legislature. It has nothing to do with a duty to represent constituents exclusively.

Similarly, the Seventeenth Amendment provides for Senators to be elected by popular vote, and provides a method for filling a mid-term vacancy in the Senate. The Seventeenth Amendment provides no authority for Plaintiff's "exclusive duty to constituents" theory.

Plaintiff argues that the basis for the duty can be established during discovery. Duty, however, is a question of law. *Armstrong v. U.S.*, 756 F.2d 1407, 1409 (9th Cir. 1985). Plaintiff has shown no legal authority for the duty he seeks to impose on these defendants. There is none. *Whitmore v. Federal Election Committee*, 68 F.3d at 1216.

The duty Plaintiff asserts could not be enforced and would be contrary to our representative form of government. Plaintiff's position suggests Arizona's Congressional delegation must vote rigidly in the interest of Arizona, as opposed to voting their conscience. Any money appropriated for other states, such as disaster relief, would not be in Arizona's interest, but would be in the country's best interest. If members of Congress pandered purely to the interest of their constituency, little would be accomplished. The Constitution presents the appropriate remedy to this dilemma. When dissatisfied with efforts of a member of Congress in representing his or her constituency, the Arizona electorate can "vote the rascal out."

Plaintiff has suggested no sound legal theory to prohibit out of state campaign contributions. The case law in this Circuit is clear that none exists. Plaintiff's Amended Complaint should be dismissed for failure to state a claim.

C. JURISDICTIONAL ARGUMENTS.

Defendants argued that Plaintiff lacked standing and that the claim was so frivolous that this court can decline jurisdiction. Because of the abstract nature of the harm alleged by Plaintiff, he lacks standing to pursue his claim.

Appendix C

In order to have standing to make a claim, a plaintiff must establish three elements:

> First, the plaintiff must have suffered an "injury in fact"— an invasion of a legally protected interest which is
>
> a) concrete and particularized
>
> b) actual or imminent, not conjectural or hypothetical.
>
> Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant and not the result of independent action of some third party not before the court.
>
> Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision.

Lucan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.C. 2130, 1236 (1992) (citations and internal quotations omitted).

At the pleading stage, as opposed to when considering a motion for summary judgment, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561, 2137.

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Plaintiff argues that he has standing before this court because he has an injury in fact which is concrete, as was found in *Tax Analysts and Advocates v. Shultz*, 376 F.Supp. 889, 898 (D.C.Cir. 1974) (a diminution of an individual's vote and an inability to affect the electoral process are judicially recognized wrongs and are sufficient allegations of actual injury).

While the harm alleged by plaintiffs in the *Tax Analysts* case is very similar to that asserted by Soling, the case itself, however, was very different. In *Tax Analysts*, a particular Internal Revenue Service Revenue Ruling was alleged by plaintiffs to conflict with a holding of the U.S. Supreme Court. The dispute was very definitive. In this case, the dispute is more philosophical than legal, with only strained attempts by Plaintiff to provide legal authority for his proposition.

A case very similar to the instant case is *Froelich v. Federal Election Comm'n*, 855 F.Supp. 868, 870 (E.D. Va. 1994), where the plaintiff was determined not to have standing because he had no case or controversy capable of judicial resolution and his injuries were abstract. In *Froelich*, plaintiffs asserted that defendant candidates for the United States Senate, who accepted contributions from non-Virginia residents, denied a meaningful vote for the office of Senator, were not loyal to Virginians, and gave more interest to wealthier states than their own. *Id.* at 870. The district court, noting that the "allegations of injury are conspicuously devoid of any claim that plaintiffs themselves have or will suffer injury-in-fact as a result of political contributions from non-Virginians," thought the matter was better suited for the legislature to handle, not the judiciary. *Id.*

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The reasoning adopted by the Court in *Froelich* applies equally in this case to determine that Soling does not have standing to bring the claims raised in the Amended Complaint. The claims are too amorphous and the allegations of injury are too speculative to be subject to resolution by a judge or a jury. The balancing of the First Amendment rights of out-of-state contributors with the in-state voter concern that money has the potential to corrupt is best handled in the first instance by the legislature.

Soling also tries to establish standing with his claim that he was denied an opportunity to meet with Senator McCain and Representative Kolbe. Plaintiff would purport to show after discovery that these Congressmen met more frequently with out-of-state contributors than in-state voters. Members of Congress have neither the legal duty nor the physical capacity to meet with all of their constituents. That people who support a candidate, financially or otherwise, would have greater access to the candidate would not be a surprise, nor would it be unlawful. Such facts give no greater definition to the legal dispute or the allegation of harm. This additional factual assertion of Soling's does not support a finding that Soling has standing in this case.

Defendants also argue that this Court lacks subject matter jurisdiction because the federal claims are so frivolous. Because supplemental jurisdiction of state law claims is not requested in this action, and given the Court's recommendation concerning dismissal for failure to state a claim and lack of standing, there is no pragmatic value to determining a lack of federal jurisdiction over this action due to frivolousness. Dismissal on this basis is not recommended.

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Other cases provide a clear example of frivolousness. In *Crowley Cutlery v. United States*, 849 F.2d 273 (7th Cir. 1988), Judge Posner had substantial reason to believe that a criminal defendant's attempt to re-argue a critical legal issue in his case in another circuit was clearly wasting federal judicial resources. In *Franklin v. Oregon*, 662 F.2d 1337 (9th Cir. 1981), one inmate's filing of 32 separate pro se inmate lawsuits was clearly a gross waste of federal judicial resources. In both cases, dismissal for want of jurisdiction over frivolous complaints was upheld. There is no assertion that Plaintiff has filed multiple actions or otherwise unnecessarily beleaguered the federal courts with his claims.

In this case, Plaintiff unsuccessfully tried to rely on specific constitutional provisions instead of suing the Federal Election Commission and attacking a provision of the Federal Election Campaign Act as in *Whitmore*, *supra.* Soling also unsuccessfully attempted to give more definition to his standing claim by alleging his lack of access to two candidates. In this action, Soling had some subtle, though unavailing, distinctions from prior decisional authority. The more appropriate basis for dismissal of this matter is failure to state a claim and lack of standing.

III. RECOMMENDATION

It is the report of this Court that Plaintiff's Amended Complaint fails to state a claim on which relief can be granted and Plaintiff lacks standing. The Court further finds that leave to amend would be futile.

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For the foregoing reasons, the Magistrate Judge recommends that the District Judge, after completing an independent review,

1. **GRANT** Defendants' Motion to Dismiss (Dockets # 29, 32).

2. **ORDER** that this case can be dismissed against all Defendants.

Pursuant to Title 28 U.S.C. § 636(b), any party may serve and file written objections within 10 days of being served with a copy of this Report and Recommendation. If objections are not timely filed, they may be deemed waived. If objections are filed, the parties should use the following case number: **CV 04-00311-TUC-FRZ.**

The Clerk of the Court is directed to send a copy of this Report and Recommendation to all parties.

DATED this 10th day of November, 2004.

s/ Charles R. Pyle
CHARLES R. PYLE
UNITED STATES MAGISTRATE JUDGE